No. 191.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

HENRY MOYER AND BETSEY MOYER, Imple'd &c.,

Plaintiffs in Error.

vs.

JAMES E. DEWEY and others,

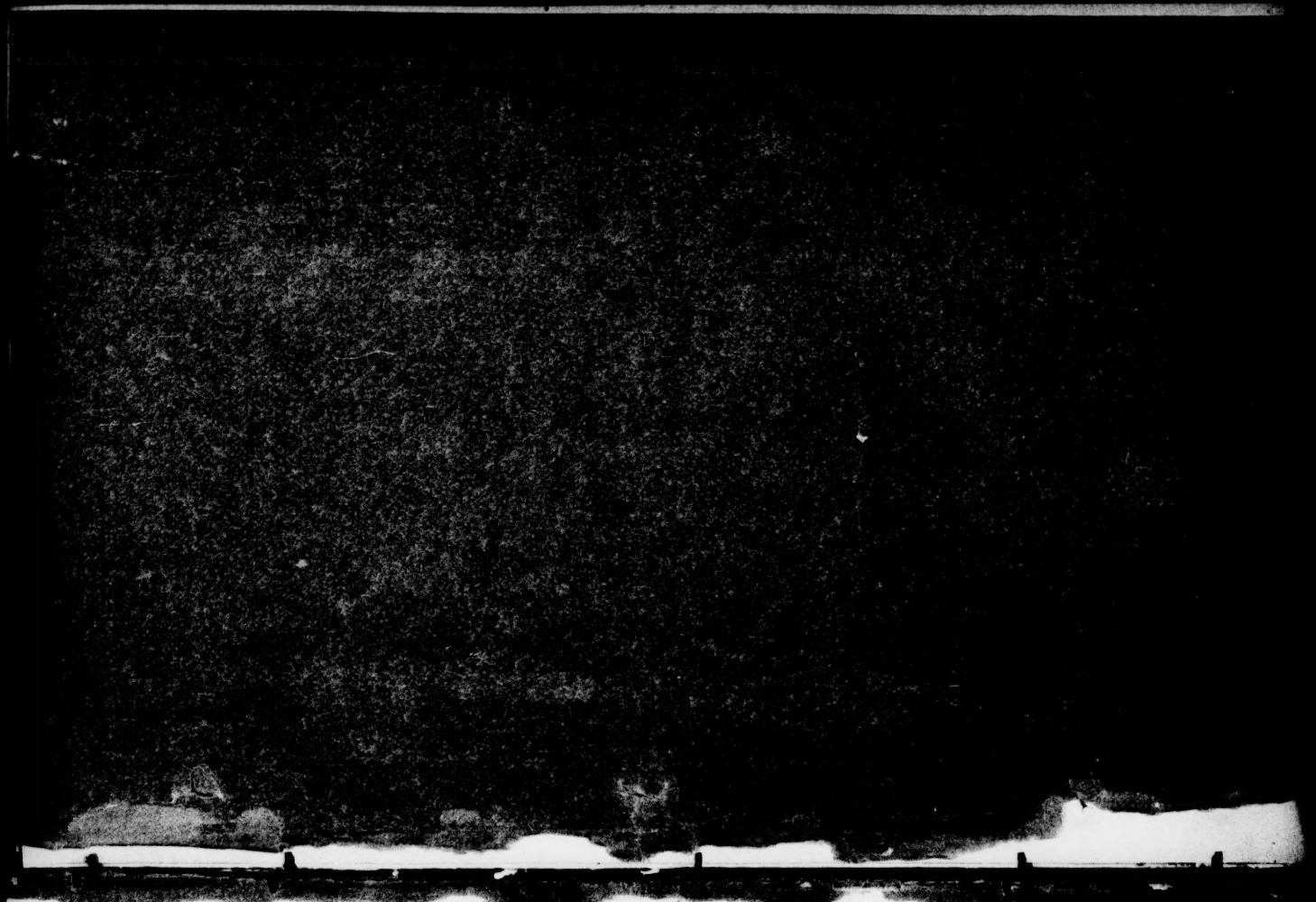
Defendants in Error.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

Brief for Defendants in Error.

J. E. DEWEY,

Counsel.



IN THE SUPREME OF THE UNITED STATES.

HENRY MOYER and BETSEY MOYER, impleaded with Clinton Eldredge, Plaintiffs in Error, *vs.* JAMES E. DEWEY and others, Defendants in Error.	No. 191. Oct. Term, 1880.

In Error to the Court of Appeals of the State of New York.

BRIEF FOR DEFENDANTS IN ERROR.

STATEMENT.

For a sufficient statement of the case on the merits, as well as upon the question of jurisdiction, we refer to our *Brief* and papers on *Motion to Dismiss*, &c., submitted April 14th, 1879, the consideration of which was postponed by the court until the case should be reached for hearing; a copy thereof being hereto annexed.

POINTS FOR DISMISSAL.

I. The writ of error should be dismissed, for want of jurisdiction, under § 709 of the Rev. Statutes. (*See Brief annexed.*)

We also submit the following suggestions, upon the peculiar claim of the plaintiffs in error to an immunity;

1. They say, in effect: "We do not claim that we have any title, or right to this property *under* any Federal statute, or authority, or under any law. Nor do we claim that, as against the defendants in error, the defrauded creditors, we have any right or title to it, under any principle of law or justice. Nor do we claim that we have any under the assignee

in bankruptcy; nor even that *he* has any *under* the bankrupt law; or, in other words, we claim none *for him;* but we do claim, that because it is vested in him, and he once had the right, *as between him and the debtor and the creditors*, to claim or take it, but never exercised it; therefore, although we have *no right* or *title* to it under the bankrupt law, yet that law gives us an immunity against being sued for it. It is therefore ours forever."

Can one find his warrant in the bankrupt law for keeping the property from creditors whom he has fraudulently deprived of it?

As said, in Long v. Converse (1 Otto, 105, 112), when applied to this case; they do not claim *under* the assignees. They claim the title of the assignees, not to protect their *own*, for they claim none, but *to defeat that of the creditors.*

II. They set up no claim under any Federal statute, or otherwise, to even that kind of immunity, (*Bank v. McVeigh*, 8 *Otto*, 332, 4); nor was any such question presented or intimated either in their answers or on the trial. (*See Rec. Opinion, p.* 40).

All they claimed then was, that they had absolute title, because there *was no fraud;* and that neither the bankrupt assignee, nor the creditors, had any right to it. Now, they concede, and even claim there was *fraud*, and therefore that they themselves never had any right to it whatever, but that it belonged to such assignee, for the creditors (including the defendants in error), or, to be administered for their benefit; and therefore the *fraudulent holders* own it, or, which is the same thing or better, that they have an *immunity.*

True, they did set up that the alleged indebtedness, to the plaintiffs below, had no *existence*, because of the discharge of the debtor, and therefore the former had no *debt* with which to follow the property

but now, they say that meant, and sufficiently expressed, that another had a better right to it under the bankrupt law, as between him and the creditors, than they; and therefore they, the fraudulent holders, without claiming under such other, or connecting themselves with his right, have a better right to keep it than the creditors have to obtain it.

This defence, the debtor's discharge, had no further scope or meaning than would a debtor's plea of a bankrupt discharge in bar, viz., that the *debt* was *barred* by the discharge. It most clearly contained no suggestion or intimation that the debt was valid or existing, but that the right of the creditors, the plaintiffs below, had passed to another, through or under whom their rights must be sought.

The *fact* relied on, and not others from which it may be implied or inferred, must be distinctly set up, even though the presumption, by statute, arises from those alleged. (*Fisher v. Mayor, etc.*, 3 *Hun* (*N. Y.*), 649; 8 *Barb.* (*N. Y.*), 250; 10 *N. Y. Rep.*, 175; 3 *Den.* (*N. Y.*), 314.)

Where evidence is competent upon *the issue* made by the pleadings (as here, the defence of a *discharge from the debt*), its admission, even without objection, gives no right to use it upon an issue *not made* by the pleadings.

> Arnold v. Angell, 62 N Y., 509.
> Williams v. The M & F. Ins. Co., 54 id, 577.
> Bruce v. Burr, 67 N. Y. 240, Church, C. J. Opinion. Record pp. 40–41.

It would have been a surprise, and a trap upon the plaintiffs below to allow its use for a purpose not even intimated on the trial, or one so foreign to that set up; for it might, if of any effect, have been met and overcome by suitable proof. (See opinion below. Rec. pp. 40–41.)

III. The merits of the action are fully considered

in the opinion below (see Rec. pp. 37–42), to which we invite the attention of the court, and in our brief below, which we ask leave of the court to hand up herewith.

A dismissal should be granted, or the judgment below affirmed, with damages for the delay.

J. E. DEWEY,

Counsel for Defts. in Error.

IN THE SUPREME COURT OF THE UNITED STATES.

HENRY MOYER and BETSEY MOYER, impleaded with Clinton Eldredge, Plaintiffs in Error,

vs.

JAMES E. DEWEY and others, Defendants in Error.

Oct. Term, 1878.

No. 756.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

BRIEF FOR DEFENDANTS IN ERROR, ON MOTION TO DISMISS AND AFFIRM.

The defendants in error respectfully submit to this court, under Rule 6, a motion, a copy whereof is hereto annexed, to dismiss the writ of error, and to affirm the judgment of the New York Court of Appeals.

STATEMENT.

The now defendants in error, plaintiffs below, being the creditors of one Clinton Eldredge, and having judgments and executions thereon returned wholly unsatisfied, against him commenced this action, in May, 1872, against Henry and Betsey Moyer, the now plaintiffs in error, and Eldredge, as defendants, to procure satisfaction of those judgments out of property placed by him in their hands, with the mutual understanding and agreement that it should be restored to him on the settlement or discharge of his debts, and with intent to defraud his creditors. (*See Record, viz.: Complaint, pp.* 1-3, 4, 5, 7. *Report and findings, pp.* 28. 29, 31, 32. *Opinion, pp.* 37-9).

Eldredge, though served, made no defence. (*Record, p.* 1).

The Moyers (plaintiffs in error), defended, taking issue on the allegations of fraud, and interposing, as their only afirmative defence to this suit, Eldredge's bankrupt discharge, in

1868, from all his debts, and that his indebtedness to the plaintiffs accrued before such discharge. (*Record—Answer of B. Moyer, p.* 12, *Sub.* 11; *of H. Moyer, p.* 16, *Sub.* 10; *Opinion, p.* 38.)

But neither set up or claimed, by answer or otherwise, any assignment of any title or right, or any defence by reason of any; or any title, right, &c., under any assignee, or proceeding in bankruptcy, or under any Federal statute or authority. (*Record, id. and Opinion, pp.* 39-41). Nor did either object that an assignee had been appointed, or that such assignee, if any, ought to have been made a party to this suit (*Opinion, p.* 41); but they claimed this property, only in their own right, and adversely to all others.

After the plaintiffs below had proved their case, the Moyers, under their alleged defence of discharge, introduced, in evidence, as a whole and connected proceeding, all the bankruptcy papers from the petition to the decree (*Rec. p.* 17–27; *Opinion, p.* 40); among which was one purporting, and only certified to be, "a copy of a copy of an assignment," (*Rec. p.* 21–2).

It appeared below, however, and was found, that in 1870, two years *after his discharge*, Eldredge, the debtor, confessed these judgments in question, upon demands and judgments previously existing. (*Rec. p.* 2–3; *Findings, pp.* 28, 32; *Opinion, p.* 38).

The trial court, after a full statement and finding of the facts (*Rec. pp.* 28–32), found that a decree was made, in 1868, discharging Eldredge from all his debts (*Rec. p.* 32), and held and decided, that the debtor, Eldredge, having waived his discharge, it was, *under the pleadings in this action, unavailable to the Moyers as a defence; and that under the pleadings* and proofs the then plaintiffs were entitled to judgment, that the Moyers held in trust for Eldredge's creditors, and that they apply sufficient of his property to satisfy these judgments; and that the then plaintiffs recover of them $4,502.44, the amount thereof and costs. (*Rec. p.* 33).

Judgment was accordingly ordered and entered (*Rec. p.* 34); which, on appeal, having been affirmed by the general

term (p. 36), and, after full consideration (*see Opinion pp.* 37–42), by the Court of Appeals (p. 37), the Moyers bring this writ of error (p. 42) and stay execution (p. 43.)

The judgment below, attempted to be re-examined upon writ of error, is not one where was drawn in question the validity of, or where any title, right, privilege or immunity was claimed under, any Federal Statute or authority; nor was the decision below against any title, or right, &c., set up or claimed, specially or otherwise, by the plaintiffs in error, or by any party, under any such statute or authority; but the decision turned upon general principles of law; for the court below, in fact, decided:

1. That the fraud, as alleged, was fully proved and that the plaintiffs first had notice of it in June, 1870, (*Opinion, p.* 37–9);

2. That, in 1868, a decree was made discharging Eldredge from his debts and that these judgments were *for debts* which accrued before then (p. 38);

3. That Eldredge did not, but the Moyers did answer and set up Eldredge's discharge, as their only affirmative defence (p. 38);

4. That although Eldredge's confession of these judgments, in 1870, on the old debts, did not revive them, they were sufficient consideration for the new judgments; which being subsequent to, were not affected by his discharge. (p. 38).

5. That there being fraud, in fact, and the Moyers connected with it, the transfers to them were void as to the plaintiffs below, although subsequent creditors. (p. 38–39).

6. That Eldredge's bankrupt assignee became vested with all his estate and all *property he conveyed in fraud of creditors.* (p. 39).

7. But that such a defense was not set up or relied upon by the Moyers, in their answers, or mentioned at the trial. (p. 39–41).

8. That the proceedings in bankruptcy were introduced simply to prove the defense of discharge, for which they were competent; but that it would be unjust, after the trial, to use them for an other purpose. (p. 40).

9. That the creditors, after appointment of an assignee, did not cease to be interested in the property, and if he refuse or neglect to reclaim it they might reach it by suit, making him and the debtor and transferees parties defendant. (p. 40).

10. That if such defense had been made, ~~and~~ or that the assignee should have been a party, the then plaintiffs might have brought him in, or shown that he had been discharged or that they represented all the debts; when, being a mere formal party, his absence would be disregarded; or, that they might have shown that he had lost his right to sue by lapse of time (p. 41); and,

11. That the then plaintiffs, in fact, represented all the debts mentioned in the schedule, except four small debts—less than $200—which, if not barred or satisfied, the Moyers will have ample property left to pay (p. 41).

The court below therefore *decided* that the proceedings in bankruptcy, as they appear in this case, were not a bar to this action (p. 41).

POINTS FOR MOTION.

I. There being no presumptions in favor of the jurisdiction of this court, it rests upon the plaintiffs in error to establish it affirmatively; and the facts upon which it depends must in some form appear in the record. (*Ex-Parte Smith*, 94 *U. S.* (4 *Otto*) 455; *The Mayor, &c., of Troy* v. *Evans et al.*; *Sup. Ct. U. S., Oct Term*, 1877, *Waite, Ch. J.*; 7 *N. Y. Week. Dig.* 108). There is, however, nothing in this record tending to show jurisdiction in any form.

II. Neither question presented below, which can be regarded as a Federal question, was decided *against* the plaintiffs in error; for it was, in fact, there decided that, in 1868, Eldredge was discharged in bankruptcy from all his debts (p. 38); and that his assignee in bankruptcy became vested with all his estate, including the property conveyed by him in fraud of creditors (p. 39).

The State Court therefore did not decide *against* any Federal Statute or authority, or its validity; or even refuse to decide such a question; but *its decision turned upon general principles of law.* It is well settled that in such cases this court has no jurisdiction (*Rockhold* v. *Rockhold*, 92 *U. S.* (2 *Otto*) 129, 130; *N. Y. Life Ins. Co.* v. *Hendren*, *id.* 286; *McManus* v. *O'Sullivan*, 91 *id.* 578, *and see the recent cases of Bank of Old Dominion* v. *McVeigh*, *and Hunt* v. *Hunt*, *Sup. Ct. U. S., Oct. Term*, 1878, *Waite, Ch. J.*; ~~19 Alb. Law Jour. 76~~; *also Bethell* v. *Demaret*, 10 *Wall.* 537). 8 Otto 332. 4, Williams v. Weaver 10 Otto 547-8. 8 Otto 332. 4

So, where a Federal question was not in fact passed upon, but its decision was *rendered unnecessary in the view which the court below took of the case*, this court has no jurisdiction; and it is proper to look to the opinion, sent here with the record, to ascertain whether, in point of fact, the court below necessarily passed upon such a question. (McManus v. O'Sullivan, 91 U. S. (1 Otto) 578, 579, Waite, Ch. J.)

It is not only necessary that some one of the questions mentioned in Sec. 709, Rev. Stat. should exist on the record, but that its decision controlled the disposition of the cause. It is not enough for the record to show that a Federal question was argued or presented for decision. It must appear that its decision was *necessary to the determination, and that it actually was decided*, or that the judgment as given could not have been given without deciding it." (State Ex. Rel. Citizens' Bank v. Board of Liquidation, Sup. Ct. U. S., Oct. Term, 1878, Waite, Ch, J. citing Williams v. Oliver, 12 How. 124, and Klinger v. Missouri, 13 Wall. 263; see Abst. 19 Alb. Law Jour. 117; Bolling v. Lersner, 91 U. S. (1 Otto) 594; Brown v. Atwell, 92 id. 327, 329). 19 How. 207. 23 Wall. 416

Nor is jurisdiction shown unless it appears that some one of the *specified questions* did arise in the State Court and that the question *was decided adversely to the party assigning error in this court*" (Edwards v. Elliott, 21 Wall, 532, 558; Crowell v. Randell, 10 Pet. 368, 392; Suydam v. Williamson, 20 How. 428, 440). Murdock v. Memphis 20 Wall. 626. Weatherby v. Bowie Waite C.J. Oct 1878 21 Alb. L. Jour. 74-5.

III. Assuming, however, that the Moyers, the plaintiffs in error, had specially set up and claimed that Eldredge's assignee in bankruptcy had the *title* or *right* to the property fraudulently held by them, and which the plaintiffs below were seeking to reach, and that the decision below had been adverse to such claim; that would not have given this court jurisdiction; for *neither the assignee nor any one claiming under him was a party* to this suit (Verden v. Coleman, 1 Black, 472; Owings v. Norwood, 5 Cranch, 344).

Otto 332. 4. The plaintiffs in error must have set up and claimed the "title or right," &c., specially *for themselves*, and not for another under whom they do not claim. The Moyers here claim no right, title, privilege or immunity under the Bankrupt Law or under the assignee (Long v. Converse, 91 U. S. (1 Otto) 105, 112, 114; Henderson v. Tennessee, 10 How. 311, 322-3; Hale v. Gaines, 22 id. 160; Williams v. Norris, 12 Wheat. 117; Montgomery v. Hernandez, id. 129, 132).

In Long v. Converse, *supra*, this court decided the precise question here, and aptly said: "The plaintiffs in error *did not claim under the assignees in bankruptcy.* They set up the title of the assignees, *not to protect their own*, but to defeat that of the receivers appointed by the State Court. They claimed *adversely to both the receivers and the assignees. They did not even allege that the assignees had ever attempted to assert title*" (Waite Ch. J., 1 Otto, 112).

We submit that the motion to dismiss should be granted.

IV. If, by any possible construction of the record, it may show jurisdiction here, it is manifest this writ of error was taken for delay only, and the question on which jurisdiction depends is so frivolous that the motion, to affirm the judgment below under the 6th Rule, should be sustained.

V. This writ of error delayed the proceedings on the judgment of the court below (Record 42–44), and was manifestly sued out merely for delay. The questions, if any, upon which the plaintiffs in error seek to maintain the jurisdiction of this court have been so frequently decided, and so long settled,

and especially as the only Federal questions in the case were decided in their favor, it would be just and proper here, if ever, to apply the 23d Rule and allow damages for such delay.

In the case of The Douro (3 Wall 564, 566), this court approved the practice of giving damages in such cases, and in Pennywit v. Eaton (15 Wall 382, 384) awarded 10 per cent damages, where the case was brought here in *disregard of the law as already settled* by precedents of the court; the court saying, "We are obliged, therefore, to regard this writ of error as prosecuted for delay."

9 Otto 607.

The defendants in error therefore pray for an affirmance of the judgment below with damages.

J. E. DEWEY,
Counsel for Defendants in error.

Copy of Motion.

SUPREME COURT OF THE UNITED STATES.

October Term, 1878.

HENRY MOYER and BETSEY MOYER, impleaded with Clinton Eldredge, Plaintiffs in Error,
vs.
JAMES E. DEWEY, JAMES REID, EPHRAIM DOCKSTADER and ALONZO B. COONS, Defendants in Error.
} No. 756.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

MOTION TO DISMISS WRIT OF ERROR AND TO AFFIRM JUDGMENT.

The defendants in error move to dismiss the writ of error and to affirm the judgment below, for the following reasons:

The defendants in error, judgment and execution creditors of Clinton Eldredge, brought this suit in 1872, in the New York Supreme Court, against him and the Moyers, plaintiffs in error, to obtain satisfaction of their judgments out of property placed by him in the hands of the Moyers, in fraud of creditors.

The debtor, Eldredge, did not defend, but the Moyers, by their answers, denied all fraud, and set up Eldredge's bankrupt discharge from all his debts, in 1868, as their only affirmative defense to this action.

The court below found, that Eldredge confessed these judgments to the defendants in error, after his said discharge, and upon demands and judgments existing before such discharge: and that before going into bankruptcy, he put his property into the possession of the Moyers (plaintiffs in error), to be restored to him when discharged from his debts.

On the trial, the Moyers, to prove their alleged defense that Eldredge had been discharged from his debts, put in evidence the bankrupt proceedings ending with the discharge; but they did not set up or claim, specially or otherwise, any "title, right, privilege or immuity," either under such proceedings, or the assignee, or the constitution, or any statute of, or authority exercised under, the United States.

Nor did they set up or claim that the assignee had any title or right to this property: but they claimed it in their own right, and adversely to both the assignee of the bankrupt and his creditors:

Nor was the assignee, or any person claiming under him, a party to this action: nor did the plaintiffs in error take any objection that the assignee was a necessary or proper party, or take any proceeding to bring him in as a party thereto, but they relied solely upon their own, and not upon his right or title:

In July, 1875, judgment was ordered and entered for the plaintiffs below, against the Moyers (plaintiffs in error) for the amount of the judgments against Eldredge, the debtor, $4,502.44, which, in January, 1877, was affirmed by the General Term of the Supreme Court, and again, in January, 1878, affirmed by the Court of Appeals of the State of New York, and this writ of error, to dismiss which this motion is made, was sued out by the Moyers immediately thereafter.

Neither the pleadings, nor the evidence, show any question of Federal jurisdiction:

Nor was any Federal question passed upon or decided below; but the decision turned upon general principles of law:

Nor was any decision made below, against any "title, right," &c., claimed by any party under any statute of, or authority exercised under, the United States:

Nor was any such title or right set up or claimed by the plaintiffs in error, or by any party:

Nor was the judgment below one where was drawn in question the validity or construction of any statute, &c., of the United States:

Nor does any one of the questions specified in section 709 (Rev. Stat.) exist, or appear on the record.

Wherefore, by reason of the facts and for the reasons aforesaid, and to avoid further delay, the defendants in error move this Court:

1st. To dismiss the said writ of error for want of jurisdiction; and,

2d. To affirm the judgment below, of the New York Court of Appeals, on the ground, that, although the record may show that this Court has jurisdiction, it is manifest the said writ of error was taken for delay only, or that the question on which the jurisdiction of this Court depends is so frivilous as not to need further argument.

J. E. DEWEY,
Attorney and Counsel for Defendants in Error,
25 N. Pearl St., Albany, N. Y.

Notice of Hearing, &c., of Motion.

SUPREME COURT OF THE UNITED STATES.

October Term, 1878.

HENRY MOYER ET AL., Plaintiffs in Error,
vs.
JAMES E. DEWEY ET AL., Defts. in Error.
} No. 756.

SIR—Please take notice that the foregoing motion to dismiss, &c., a copy whereof, with a copy of the brief or argument of the said defendants in error thereon, are herewith served, will be brought on before, and submitted under Rule 6, to this Court at the Capitol, in the city of Washington, D. C., on the 14th day of April, 1879, at the opening of the Court on that day.

Albany, N. Y., March 21st, 1879.

Yours, &c.,

J. E. DEWEY,
Attorney and Counsel for Defts. in Error.

To M. HALE, Esq.,
Att'y and Counsel for Pl'ffs in Error.

(Endorsed) "Supreme Court of the United States. Henry Moyer et al., pl'ffs in error, agt. James E Dewey et al., defts. in error. Motion to dismiss, &c., and notice of hearing.

J. E. DEWEY,
Attorney for Defendants in Error.

I admit due and personal service on me of the within motion, notice of hearing or submission thereof and of a copy of the brief or argument of the defendants in error thereon, this 21st day of March, 1879.

M. HALE,
Attorney and Counsel for Pl'ffs in Error."